

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 05-CV-329-GKF-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

WILLOW BROOK FOODS, INC.'S TRIAL BRIEF FOR HEARING ON
PRELIMINARY INJUNCTION

Defendant Willow Brook Foods, Inc. ("Willow Brook") submits the following trial brief for the Court's consideration in connection with Plaintiffs' motion for preliminary injunction.

Willow Brook is a relatively small meat processor based in Springfield, Missouri. The company has never owned a poultry grow out operation in the State of Oklahoma ("State") or the Illinois River Watershed ("IRW"). It has never owned any poultry litter and has never land applied any poultry litter in the IRW.

At the time Plaintiffs added Willow Brook as a defendant in this lawsuit, Willow Brook had contracts with two independent growers in the State and in the IRW. Since early 2007, Willow Brook has had a contract with only one independent grower in the State and the IRW. The cost of defending this lawsuit has proven to be a great burden to Willow Brook. In order to end any potential for liability from ongoing operations in the State, Willow Brook has decided to permanently cease contracting with independent growers in the State. Willow Brook's sole remaining independent grower in the State and the IRW presently is growing out four flocks of birds owned by the company. Two of the four flocks will be sold in March 2008. The other two flocks will be sold by the

end of June 2008. By June 30, 2008, Willow Brook will no longer own any birds in the State and will no longer contract with any independent grower in the State.

Willow Brook's final independent grower in the State, as well as all growers in other states who contract with Willow Brook, is an independent contractor of Willow Brook, not an agent. The grower owns all of the poultry litter produced by his poultry feeding operations. The grower has informed Willow Brook that he does not land apply any poultry litter, but instead sells the poultry litter to a third party who land applies it outside of the IRW.

Plaintiffs seek to separately enjoin each defendant, including Willow Brook, from:

(1) applying poultry waste to any land within the [IRW] and (2) allowing the application of poultry waste generated at its respective poultry feeding operations and/or the application of poultry waste generated at its respective poultry feeding operations under contract with it to any land within the IRW.

Dkt. No. 1373, at 10, 24.

As explained in great detail in Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, Plaintiffs faces a steep burden to prove entitlement to a preliminary injunction. See Defendants' Memorandum In Opposition To Plaintiffs' Motion For Preliminary Injunction [Dkt. 1531] at 2-47. The resolution of Plaintiffs' Motion for Preliminary Injunction ("Motion") with respect to Willow Brook is simple because Plaintiffs cannot prove any conduct by Willow Brook or its sole grower that even allegedly causes injury. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("[T]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); *Garrison v. Baker Hughes Oilfield Op.*, 287 F.3d 955, 961 (10th Cir. 2002) ("It is well settled an injunction must be narrowly tailored to remedy the

harm shown.”) (citing *Citizen Band Potawatomi Indian Tribe v. Okla. Tax Comm'n*, 969 F.2d 943, 948 (10th Cir. 1992)).

Plaintiffs claim that land application of poultry litter in the IRW causes injury. Even if this were true—which Willow Brook denies—Willow Brook does not land apply any litter in the IRW. The case law is clear that the Court should “refrain[] from issuing an injunction unless the injunction ‘will be effective to prevent the damage which it seeks to prevent.’” *Humble Oil & Refining Co. v. Harang*, 262 F. Supp. 39, 42 (D. La. 1966) (quoting *Great N. Ry Co. v. Local Union No. 2409*, 140 F. Supp. 393 (D. Mont. 1955)). Moreover, the requested injunction would be directed towards Willow Brook, not those who actually own or use poultry litter. *Blease v. Safety Transit Co.*, 50 F.2d 852, 856 (4th Cir. 1931) (“It is elementary that a Court will not grant an injunction to restrain one from doing what he is not attempting to do and has not done.”). See also *Aerated Prods. Co. v. Dep’t of Health*, 159 F.2d 851, 854 (3rd Cir. 1947). In any event, even if Willow Brook’s grower, who actually owns poultry litter, was a party to this lawsuit, he does not land apply any poultry litter in the IRW or even sell litter to a third party who land applies it in the IRW.¹

¹ Further, Plaintiffs lack evidence to prove that land application in the IRW of poultry litter owned by Willow Brook’s sole grower could cause injury. Plaintiffs admit that they have not analyzed any poultry litter owned by this grower. Plaintiffs’ expert witness, Roger Olsen, PhD., testified during his February 2, 2008 deposition as follows:

17 Q Sir, are you aware that there are in fact
 18 differences between the composition of litter
 19 originating under contract -- originating on farms
 20 under contract with each of the various defendants
 21 in this case?
 22 A Very -- we've done complete analysis of litter
 23 from all defendants, except for Cal-Maine and Willow
 24 Brook ...
 (Ex 1, Deposition of Dr. Olsen, Page 14, Lines 17 – 24).

In sum, for the reasons set forth herein and in the pleadings filed by Defendants in opposition to Plaintiffs' Motion, Plaintiffs cannot establish their case as to Willow Brook. The Court thus should deny Plaintiffs' request for a preliminary injunction against Willow Brook.

Respectfully submitted,

LATHROP & GAGE, L.C.

/s/ Jennifer S. Griffin

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COUNSEL FOR WILLOW BROOK FOODS, INC.

15 Q You've analyzed no litter for Cal-Maine or
16 Willow Brook?

17 A That's right.

(Ex 1, Deposition of Dr. Olsen, Page 20, Lines 15-17).

CERTIFICATE OF SERVICE

I certify that on the 19th day of February 2008, I electronically transmitted the attached document to the following ECF registrants:

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2 NORTHERN DISTRICT OF OKLAHOMA
3
4

5 W. A. DREW EDMONDSON, in his)
6 capacity as ATTORNEY GENERAL)
7 OF THE STATE OF OKLAHOMA and)
8 OKLAHOMA SECRETARY OF THE)
9 ENVIRONMENT C. MILES TOLBERT,))
10 in his capacity as the)
11 TRUSTEE FOR NATURAL RESOURCES))
12 FOR THE STATE OF OKLAHOMA,)

13 Plaintiff,)

14 vs.)

15 TYSON FOODS, INC., et al,)

16 Defendants.)

17 - - - - -
18 THE VIDEOTAPED DEPOSITION OF
19 ROGER OLSEN, PhD, produced as a witness on behalf
20 of the Defendants in the above styled and numbered
21 cause, taken on the 2nd day of February, 2008, in
22 the City of Tulsa, County of Tulsa, State of
23 Oklahoma, before me, Lisa A. Steinmeyer, a Certified
24 Shorthand Reporter, duly certified under and by
25 virtue of the laws of the State of Oklahoma.

1 poultry waste signature; correct?

2 A That's correct.

3 Q Okay. Sir, is your definitive poultry waste
4 signature unique to litter from farms under contract
5 with my clients?

09:14AM

6 A No. It represents the general composition and
7 specific composition of all the waste we've
8 measured. We've measured your concentrations in
9 waste in runoff from your fields.

10 Q Okay, but your signature when you look at the
11 environmental data does not allow you to determine
12 whether the contamination that you see in a sample
13 comes from litter from a farm under contract with
14 Tyson or George's or some other defendant; correct?

09:14AM

15 A That's correct. The signature alone does not
16 identify a specific defendant.

09:15AM

17 Q Sir, are you aware that there are in fact
18 differences between the composition of litter
19 originating under contract -- originating on farms
20 under contract with each of the various defendants
21 in this case?

09:15AM

22 A Very -- we've done complete analysis of litter
23 from all defendants, except for Cal-Maine and Willow
24 Brook, so we've looked at the chemical composition
25 of that, the major components and most of the senior

09:15AM

1 myself have taken on sites to determine essentially
2 the fate and transport through the environment and
3 determine in each component in the environment, you
4 know, what chemical composition and bacterial
5 composition is present. So we start with the
6 source, the litter here, and, again, we've analyzed
7 it in about 20 different samples.

09:22AM

8 Q 20 samples of poultry litter?

9 A Yes.

10 Q Okay.

09:22AM

11 A And all the defendants, except the two that I
12 already mentioned.

13 Q Cal-Maine and Willow Brook?

14 A That's exactly right.

15 Q You've analyzed no litter for Cal-Maine or
16 Willow Brook?

09:22AM

17 A That's right. So we have that chemical and
18 bacterial composition, so that's one compartment.

19 Okay. The next compartment is where it's placed on
20 the soil. So we looked at that next compartment on
21 fields and, again, we've looked at -- I think it's
22 about 60 different fields, and there's, you know,

09:22AM

23 two to four subareas per each of those fields, maybe
24 a little less fields, maybe 30 to 40 fields, and two
25 to four subcompartments on each of those fields and,

09:23AM